A PROBLEM IN THE DRAFTING OF WORKMEN'S COMPENSATION ACTS.

I.

Personal Injury Arising Out of and In the Course of Employment.

UNTIL very recently it has been assumed that the right of action which workmen had at common law against their employers secured to them a reasonably adequate remedy for the loss which they sustained by injuries due to industrial accidents. Whatever legislation there was looking to a fuller remedy preserved the fundamental conception of the common law that fault in the preparation or operation of the business was essential to the employer's liability. Such legislation merely relieved employees, more or less fully, from the operation of certain defenses, some of them peculiar to the relation of master and servant, as that of fellow service, others common to all persons who had associated themselves with others for the mutual benefit of both, as that of voluntary assumption of risk. In some few instances they are relieved from the defense of contributory negligence, available against all who seek compensation for harm resulting from another's negligence.

Within the last few years, particularly within the last two, there has been a complete change in the attitude of public opinion. There are now in force in no fewer than ten states acts by which the owner of a business is made to bear a part of the loss resulting to his workmen from injuries received by them in his service, whether due to a defect in the conditions or operations of the business or not, or to insure his workmen at least partially against such loss. Nor has this movement spent its force; on the contrary, the impulse towards such legislation seems stronger than ever. It is not proposed to discuss the economic or social problems involved or to consider all the legal questions presented; no attempt will be made to deal with the very difficult questions which arise as to the constitutionality of such acts, whether compulsory or — in form at least — elective. One question, and one only, will be discussed.

Whether the system adopted is that of insurance as in Germany and generally on the Continent of Europe, or compensation payable directly by the employer as in England, every act so far enacted or drafted has, in defining the injuries to be insured against or compensated, adopted phraseology copied verbatim or modeled closely upon the language used in the English Acts of 1897 and 1906, in which it is provided that,

"if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation."

This language has been adopted upon the assumption that it has acquired by judicial construction, during the years which have elapsed since these acts were passed, so fixed and certain a meaning that a resort to the English decisions will, in a great majority of cases, render further interpretation and construction unnecessary and so avoid that vast amount of litigation generally required for this purpose.

It is the purpose of this article to examine briefly the English, Scottish, and Irish cases in which this section has been considered and to ascertain whether this assumption is in fact justified, and whether in so far as a definite meaning has been judicially attached to these words, it is one which carries into effect the objects which such legislation is designed to accomplish. It is necessary also to ascertain whether such definiteness as exists has been reached by a course of reasoning such as is apt to commend itself to American courts, or whether it has not resulted from arbitrary and illogical distinctions.

In ascertaining whether the construction put upon this clause accomplishes the objects which such legislation is designed to carry into effect, it is impossible not to consider briefly the public opinion which demands such legislation. While a large part of the thinking public is dissatisfied with the present method of distributing the loss caused by industrial accident and desires to transfer to the employer at least a part of it, it is extraordinary how little unanimity there is as to the reasons for their dissatisfaction with the existing state of the law and for their desire to alter it. The motive which dominates probably the largest body of persons who advocate workmen's compensation acts is sentimental humanitarianism, that altogether admirable instinct which revolts from the contemplation of individual suffering and which regards as unjust any condi-

tion, social or legal, which throws a loss upon a class of individuals unable to bear it without actual suffering. There is a further body of public opinion, that of the advanced collectivist who believes that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily upon the employer, who, in theory at least, can add the cost to the price of his product and so distribute the loss among that part of the community at least whose wants call his business into existence. This sentiment is stated by a considerable group of economists in the form of the economic law or doctrine, to the effect that the consumer should bear, as part of the cost of the article which he uses, all the loss which its manufacture entails, including the destruction and impairment of the human instrument of manufacture as well as the destruction and impairment of the other instruments, which, since such instruments are owned by the employer, is already taken into account in fixing the price of the commodity. There is a large body of public opinion that believes that the task of maintaining those reduced to want by industrial accident should be borne primarily by the industry which creates it, and ultimately by the consumer to whose wants such industries minister, rather than that it should be thrown directly upon the public funds realized by taxation.[1] Another considerable body of public opinion is inspired by that different species of humanitarianism which considers the improvement of the human race as a primary object of consideration rather than the relief of unfortunate individuals. To such a one it appears intolerable that workmen and their families as a class should be subject to the risk of fortuitous degradation in the social scale by an accidental injury to the head of the family, thereby throwing the entire family back into a submerged or pauper class or into a class but little better, and so rendering nugatory the effort expended in raising them to the position from which their mere misfortune has cast them. To workmen as a class such legislation may well appear a distinct gain, and their support has undoubtedly been a strong impulse to the adoption of this sort of legislation.

But there is in addition a large class who entertain a well-grounded

[1] See Fletcher Moulton, L. J., in the recent case of Astley *v.* Evans & Co., [1911] 1 K. B. 1036, 1042–1043.

and growing dissatisfaction with the waste and uncertainty of the present state of the law,—a waste which is inseparable from any system which requires the proof of fault as a basis to liability and which, being based upon the essentially common-law idea of antagonistic litigation, makes the right to recovery depend upon the proof of difficult and uncertain issues of fact. If the acts passed and those which undoubtedly will be passed accomplish no more than the extension of the field within which claims of workmen for compensation may be advanced with a chance of success, but within which the employer may hope equally to resist liability successfully, the waste of litigation instead of being diminished will be increased by widening the area in which it may occur. Such a result would satisfy no one.

The relief afforded workmen and their dependents will still fall far short of that intended. Even if the workmen or his dependents are successful, a part of the sum paid by the employer will be diverted to the payment of legal expenses and counsel fees, which, unless strictly scrutinized and rigorously supervised, will undoubtedly tend to be exorbitant. It is impossible to suppose that the awakened public conscience will be satisfied to have any considerable proportion of the relief which such acts are designed to give to workmen and their dependents go to that highly unpopular species of the genus middleman, the accident lawyer, or as he is sometimes, perhaps not unjustly, called, the ambulance-chaser. Not only will the relief be diminished in amount but it will be delayed during the period of litigation. The inability of the working classes to bear without undue suffering and social degradation the loss resulting to them from industrial accident alone justifies their being singled out from among all those accidentally injured by business activities as worthy of this special relief. The object is to provide for the workmen and his dependents a means of livelihood in lieu of the wages which his injuries prevent him from earning. In no act, enacted or proposed, is the "waiting period" during which the workman himself bears the loss of his earning power greater than two weeks, and this because the various commissions that have drafted the acts have concluded that workmen as a class are incapable of adequately caring for any longer period of enforced idleness. If this be true, it is evident that the hope of future compensation, after months or perhaps years of litigation, would not adequately save them from suffering, preserve them from economic and social de-

gradation, or prevent them becoming a charge on public or private charity. In order to relieve their immediate needs, they would be forced to consent to disadvantageous compromises or to sell their claim at a ruinous discount. Nor can unscrupulous employers or their insurers, who, having no direct contact with labor, would have less inducement to treat claimants fairly, be expected to neglect the opportunity of forcing such compromises by defending every case in which there was the most remote chance of success.

To employers the result is at least as unfavorable. They would be subjected to new demands and added costs, not merely in the sums expended for compensation, but in those paid for the cost of litigation as well, without any corresponding saving. There is a point beyond which the cost of production cannot be increased without destroying the profit of the producer and so directly driving him out of business or raising the cost of the commodity to a point where the demand is stifled, and so indirectly reaching the same result. The ultimate success or failure of this form of legislation, one may venture to predict, will depend upon whether the modern humanitarian and collectivist sense of justice can be satisfied without unduly burdening business or the consumers whom it serves, and this can only be done by recouping the employer for the additional burden which will undoubtedly be put upon him by relieving him from the cost of litigation, by reducing to a minimum the cost of enforcing the claims, and so securing to workmen and their dependents the fullest possible share of the sums paid by the employers, and by making the compensation payable to them at the earliest possible moment, so that their current expenses can be immediately met. To accomplish this it is essential that the act should be so drawn as to be as far as possible automatically applicable to any given state of fact, and, as far as may be, to prevent the right to compensation from becoming a subject of antagonistic litigation.

There is also a substantial agreement that the duty of making compensation is not to be imposed upon the business as a penalty for its misconduct. The determination of the existence or extent of liability, or of the right to compensation, by the guilt or innocence of the parties, is appropriate only if the object of the act is to punish wrongdoing. Punishment is both expiatory, a penalty for the fault committed; and preventive, a deterrent to the commission of a fault penalized. The objects of such acts being, not to punish the

owners of delinquent businesses but to remedy the existing condition of affairs which offends modern ideas of social justice and to protect workmen and their dependents, as a class incapable of self-protection, from want and social and economic degradation, fault as a thing to be expiated has no place therein as a determining factor. There are many persons who believe that a compensation act should concern itself only with the adjustment of a loss actually sustained and that the prevention of accident should be dealt with by separate and distinct legislation. But no act, however carefully drawn with this object in view, can fail to have a distinct preventive force in that it becomes to the master's advantage to diminish accidents with the attendant liability to make compensation for the resulting loss, and so the spur of self-interest operates to impel the employer to take steps for the protection of his employees. And since it seems that the ultimate object is to protect workmen and their dependents from want and degradation, social and economic, the loss caused by industrial accidents actually occurring being placed upon the employer merely as a means to this end, the remedy would be needlessly incomplete if any effective incentive to the elimination of the cause of the loss were overlooked.

Therefore a penalty should be imposed upon fault productive of industrial accidents if, but only if, there is good reason to believe that thereby the commission of such faults will in whole or in part be prevented and so the number of such accidents diminished. It would seem, therefore, that, where the employer has personally been guilty of a deliberate failure to provide adequately for the safety of his work-people, he should be liable to make an enhanced compensation, or the employee's right to sue for all his loss at common law should be preserved. But it does not follow that the workmen should also be deprived of compensation because their injury is due in part or in whole to their deliberate, wilful, and serious misconduct. It may be that the public sense of justice has not yet reached the point where it can divorce itself from the idea that a man wilfully reckless and deliberately taking serious and unnecessary risks should suffer for his conduct, but unless there is so strong a feeling to this effect that an act not recognizing it would be generally regarded as unjust, there seems no justification for depriving an employee of compensation because of even wilful and deliberate misconduct, unless there is good reason to believe that by so doing

servants as a class will be impelled to avoid such acts, and that thus the great number of accidents to themselves and others due thereto will to some considerable extent be prevented.

It may perhaps seem unjust to make the master and not the servant suffer for his individual fault. But it must be remembered that the employer suffers alone, and that, while the fault is that of the injured workman, the penalty is paid not by him only, but by those dependent upon him as well. The public opinion which regards it as unjust that a man should profit by his own fault may yet shrink from visiting the sins of the father upon the children. Then, too, an enhanced compensation will not, save in very exceptional cases, seriously cripple a business, while to deprive a workman and his family of compensation will be their economic destruction. The English Act of 1897 provided that no compensation should be allowed if the injury to the workman was attributable to wilful and serious misconduct, and under the German law the workman is still barred by his own gross carelessness. But in the English Act of 1906 compensation was allowed where the accident results in death or serious and permanent disablement. It may be that it was thought that the risk of such serious consequences would be sufficient deterrent to the workman, but it is significant that in the one case the whole of the loss would fall upon innocent dependents, and that in the other the consequence to the workman and his family would be the total destruction of their means of livelihood.

But apart from this there is good reason to believe that, while the penalty of an additional liability imposed upon employers for the deliberate disregard for the safety of their employees may be expected to impel them to afford their employees such protection as will materially diminish the number of accidents, denial to a servant and his dependents of compensation for his wilful and reckless misconduct cannot reasonably be expected to have such an effect. The employer runs no risk of personal injury — his interest in his employees' safety is either directly or indirectly financial or humanitarian. Very many employers, impelled by humane motives, or realizing that by securing the safety and good will of their employees they will increase their efficiency, do expend large sums in providing every reasonable protection to their work-people, but such motives alone are insufficient to cause those employers who regard the matter as purely one of dollars and cents to take such

precautions, so long as they are subject to no additional liability for their failure to do so. The only consideration which can move such employers is the knowledge that the sums expended in protection will save them from the necessity of paying greater sums under an increased liability. The interest of the servant, on the contrary, is not wholly financial; the servant by his reckless conduct risks his own person as well as his earning power. But since the fear of personal injury and of the loss of their earning power, which under our present system they must bear themselves, has not in the past proved sufficient to deter workmen from recklessly running unnecessary risks, it is hardly probable that they will be impelled to greater care through the fear of forfeiting the compensation to which they would be entitled under the act if injured without recklessness.[2]

There is an additional reason why a workman should not be barred by his reckless exposure of himself to unnecessary danger. Whether the exposure is deliberate, whether it is reckless, whether a danger is unnecessarily encountered, are all highly controvertible and litigable questions. While the American workman probably takes greater risks than any other, he is accustomed to working more quickly. This rapidity of work carries with it as an inseparable incident the necessity of taking chances. Not only is he accustomed to work rapidly, but rapidity is required of him. How far then his exposure is wilful and deliberate in the sense that it is done for a purely private purpose of his own, how far the danger is unnecessary and not merely one which he must face in order to reach the standard of efficiency required by his master, will in many cases be doubtful.[3]

Since the denial to workmen of compensation for injuries caused

[2] This is not a trait peculiar to work-people but is common to all humanity. While men seek to avoid dangers for fear of injury, few, if any, refrain from any action simply because such action will bar a possible right of suit for damages.

[3] Take the instance of a failure to use safety devices provided by the master or to obey the rules and regulations made for the workmen's protection. The contention of the workmen in many cases is, that the safety devices impede rapid work, and that they are required to produce an output or to work at a rate which makes it impossible to use such devices or to obey the rules and regulations and yet reach the standard of speed and efficiency in production which their employers require of them, and that if they do fall short of this standard, the excuse that the failure is due to their use of safety devices or their obedience to rules and regulations will not protect them from at least the bad opinion of their employers.

by their deliberate disregard of their own safety and that of their fellow workers does not seem likely seriously to check such conduct, while it would undoubtedly tend to raise highly doubtful and litigable questions of fact, it seems advisable to deny compensation only when the sufferer has intentionally brought the injury upon himself, as has been done in many of the recent acts, enacted and proposed. If such course be pursued, it is quite evident that the act should be so clearly drawn that it will be impossible for the courts, who may well be out of sympathy with the idea of allowing compensation to one wilfully at fault or those who are dependent upon him, indirectly to defeat the purpose of the act by construing vague and uncertain definitions of the injury to be compensated as excluding injuries from risks to which the claimant's deliberate misconduct has exposed him. If, on the contrary, it is thought advisable to make deliberate misconduct, obviously tending to subject the workman to grave and unnecessary risk, a bar to compensation, this should be explicitly set forth in some separate clause of the act as a special exception to a general liability,[4] as was done in the English Act of 1897; and here again the injuries which are the subject of this general liability should be so clearly defined that the guilt or innocence of either party cannot possibly be held to be a determining factor.

The consideration of the English cases which have defined and applied the provision, contained in both of the English Workmen's Compensation Acts, that

"if in any employment a personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation,"

may be conveniently divided into two principal inquiries: *First*, how has "personal injury by accident" been defined? *Second*, what, if any, definite principles and rules had been formu-

[4] It would seem well to specify clearly the particular forms of misconduct, as intoxication, failure to use safety appliances, etc., which are to bar compensation. Thus the very difficult and doubtful question as to whether any particular misconduct is so serious and wilful as to bar the claimant will be in great part eliminated. And also it will be impossible for courts to give so wide a construction to the term "serious" as practically to reintroduce the defenses of contributory negligence and voluntary assumption of risk, or a defense which is a composite of the two, and as such may be called the voluntary and negligent assumption of unnecessary risk.

lated for the determination of the question whether such an injury "arises out of" and is received "in the course of the workmen's employment"?

"*Personal Injury by Accident.*"

1. Since the decision in Brinton's Ltd. *v.* Turvey there seems to be no doubt that disease contracted in the course of the employment is as much an injury as a violent alteration of the physical structure of the body. It is true that there occur *dicta* which indicate that it is not every disease caught by the workman in the course of his employment that is to be regarded as "an injury by accident." [6] But it would appear that what these refer to is the necessity that the disease shall be sustained by accident arising out of and in the course of the employment. This requirement applies equally to the impairment of the physical structure, and notwithstanding these *dicta* it may be taken that the later English cases draw no distinction between these two forms of injury.

In the case of Brinton's Ltd. *v.* Turvey the deceased was employed in opening and sorting bales of wool, and while so employed the bacillus of anthrax settled in the corner of his eye and caused infection; it was held that his death was an "injury by accident" for which his dependents were entitled to compensation. Much stress is laid, in the opinions in the Court of Appeal, upon the fact that the impact of the germ was a violation of the integrity of the claimant's body, — a blow which, though microscopically minute, produced an immediate effect upon the claimant's person. In the House of Lords particular emphasis is laid upon the accidental nature of the infection, the great number of unusual factors which contributed to it. This decision, therefore, did not involve the necessity of holding any disease, other than that caused by specific

[5] [1905] A. C. 230, 7 W. C. C. (Workmen's Compensation Cases) 1.

[6] So, Lord Atkinson in his dissenting opinion in Clover, Clayton & Co. *v.* Hughes, [1910] A. C. 242, 250, 3 B. W. C. C. (Butterworth's Workmen's Compensation Cases) 775, says: "the definition given of 'by accident' in Fenton *v.* Thorley, [1903] A. C. 443, must exclude disease." See also the language used by Lord Macnaghten in his dissenting opinion in Ismay, Imrie & Co. *v.* Williamson, [1908] A. C. 437, 1 B. W. C. C. 232, the very guarded language of Lord Ashbourn in the same case, the opinions of Cozens-Hardy, M. R., Farwell, L. J., in Eke *v.* Hart-Dyke, [1910] 2 K. B. 677, 3 B. W. C. C. 482, and the Lord President in Coe *v.* The Fife Coal Co., 46 Scot. L. Rep. 328, 2 B. W. C. C. 8 (Ct. Sess., 1909).

germ infection, or that contracted under conditions unusual in the business, to be an injury by accident. However, the later cases, following it, have discarded such refinements and have held that any disease of sudden origin, if plainly attributable to the nature of the workman's employment, is an injury by accident. So, it has been held, that a heat-stroke sustained by a stoker in the stokehole of a steamer,[7] a sun-stroke received by a sailor engaged in painting a vessel in dry-dock,[8] and kidney disease due to a chill contracted while working waist deep in water,[9] were injuries by accident. It is to be noticed that these cases go beyond the reasoning of the above opinions in Brinton's Ltd. *v.* Turvey. No foreign substance, however minute, had struck or invaded and injured the person's body. In none of them was there anything unusual in the work in which the workman was engaged; there was no series of unexpected events which brought about his disease; the only thing unexpected in any of these cases was that such work should injure the man engaged upon it, the only unknown and unusual factor was the physical condition of the workman, which rendered him subject to the disease contracted.

2. But it is not enough that the servant is injured while employed, whether the injury be by disease contracted or by some disturbance of his physical structure. In either case the injury must be "by accident." The term "by accident" has been consistently construed to include two different ideas: the first is that of unexpectedness; the second, that of an injury sustained on some definite occasion, the date of which can be fixed with reasonable certainty. The first idea would be as well conveyed by the word "accidentally" or by any phrase or phrases in which unforeseen harm is sharply contrasted with harm intended or expected to result. The latter idea, it is submitted, is not necessarily included in the term "accidental" or "accidentally"; such words, especially if the phrases employed in such legislation are to be construed in accordance with the popular meaning of the terms used, do not appear necessarily to indicate the existence of an accident, but would seem to relate solely to the injury being neither intended nor expected.

[7] Ismay, Imrie & Co. *v.* Williamson, [1908] A. C. 437, 1 B. W. C. C. 232.

[8] Morgan *v.* S. S. Zenaida, 25 T. L. R. 446, 2 B. W. C. C. 193 (C. A., 1909).

[9] Sheeran *v.* Clayton & Co., 3 B. W. C. C. 583 (1909). So in Kelly *v.* Auchenlea Coal Co., 48 Scot. L. Rep. 768 (Ct. Sess., 1911), it was held that pneumonia caused by inhalation of poisonous gas was an injury by accident.

While the English cases have consistently regarded the phrase "by accident" as indicating something unexpected, the earlier and later cases differ as to whether the cause of the injury must be some unforeseen and unusual operation of the business or condition of the plant, or whether it was enough that the injury itself was unexpected.

The earlier cases required that there must have been something unusual and unexpected in the external influences to which the sufferer was subjected in the course of his employment. No injury was regarded as sustained by accident where the workman was harmed while doing the very work he was employed to do under conditions usual thereto. No compensation was awarded unless there was some departure from the ordinary operation of the business or some unusual condition of the plant; it was not enough that, because of some peculiar physical condition of the workman, permanent or transitory, known to him or not known to him, the work, which he did not expect to injure him, in fact proved harmful; there must be some factor external to the claimant's physical condition.

The courts, however, were prone to regard rather minute departures from the ordinary course of the employment as being sufficient to amount to an unexpected external event.[10]

It was also held that the departure from the usual operation of the business might be some unusual act of the servant himself if done in the prosecution of the business, and this act might be some careless act of his own, — an unintentional slip, or an act intentionally done but whose results, owing to some miscalculation, were not foreseen or designed.[11] It is evident that there is much

[10] So it was held that a strain received while lifting a pile of boards which had been stuck together by ice and whose removal thereby required an unusual effort was an accident. Timmins *v.* Leeds Forge Co., 83 L. T. 120, 16 T. L. R. 521, 2 W. C. C. 10 (1900). And so it was held that the claimant might recover compensation where his hand was jarred by a blow inaccurately struck by a fellow workman on the tool which the claimant was holding. Lloyd *v.* Sugg & Co., [1900] 1 Q. B. 481, 486, 2 W. C. C. 5.

[11] In Boardman *v.* Scott & Whitworth, [1902] 1 K. B. 43, 4 W. C. C. 1, a workman was required to remove a beam from a loom and in lifting it he balanced it unevenly upon his shoulder. In order to get it into a position of equilibrium, he gave it an extra lift, the strain of which lacerated the muscles in his side; it was held that this was an injury by accident, the improper and unusual manner in which the workman himself had originally balanced the beam upon his shoulder being taken to be an unusual condition of the labor which the servant had not expected to encounter.

to be said for this interpretation; any other view would bar a stupid or ignorant servant from compensation where he had through some slight miscalculation subjected himself to injury which a more skilled and prudent workman would have avoided.

Since the case of Fenton *v.* Thorley, nothing more is required than that the harm that the plaintiff has sustained shall be unexpected.[12] It is no longer required that the causes external to the plaintiff himself, which contribute to bring about his injury, shall be in any way unusual; it is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs "by accident" is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing. What was actually probable or even inevitable because of circumstances unknown to the sufferer is even more unimportant.[13] The test is purely subjective to the injured workman.[14]

[12] "In determining the question whether the injury was caused by an accident we must discriminate between that which must occur and that which need not necessarily occur in the course of the employment," Mathew, L. J., in Boardman *v.* Scott & Whitworth, *supra*; though it be a thing which has happened before and is likely to happen again. Neville *v.* Kelly Bros., etc., 13 Brit. Col. 125 (1907). In one class of case there is a tendency to regard as accidental injuries which the workman probably foresaw as very likely to result from some particular action intentionally undertaken. There are cases where a workman voluntarily encounters a very serious risk of injury in an effort to save his master's property from injury or to rescue a fellow workman from peril, and so, if successful, incidentally protecting his employer from liability to make compensation or diminishing the amount thereof. Rees *v.* Thomas, [1899] 1 Q. B. 1015, 1 W. C. C. 9 (workman injured while trying to stop his employer's runaway horses); Hapelman *v.* Poole, 25 T. L. R. 155, 2 B. W. C. C. 48 (1908) (menagerie attendant killed while trying to drive escaped lions back to their cage); Matthews *v.* Bedworth, 1 W. C. C. 124 (County Ct., 1899) (miner killed in going down shaft, after being warned of danger, in order to rescue fellow miner overcome by choke damp); London & Edinburgh Shipping B. *v.* Brown, [1904–1905] Session Cases 488, 7 Fraser 488 (Ct. Sess., 1905) (dock laborer killed in an attempt to rescue fellow worker overcome by noxious gas in the hold of a vessel which he was unloading). But see the strong dissent of Lord Kyllachy in the last given case. In none of these cases was the injury inevitable, though in most of them the danger was very great.

[13] It is quite clear that the view advanced by Lord Shaw in Clover, Clayton & Co. *v.* Hughes, [1910] A. C. 242, 3 B. W. C. C. 775, that nothing is unexpected which is inevitable under conditions actually existing though unknown to everyone, is untenable; such a purely objective view of unexpectedness would clearly bar compensation in all but that small class of case where the injury results from some unusual combinations of causes.

[14] In the late case of Clover, Clayton & Co. *v.* Hughes, *supra*, Lord Macnaghten,

By this definition the intention or expectation of anyone other than the injured workman is immaterial. An injury, unexpected by him, is none the less an accident because intentionally inflicted by some third person.[15] The workman's miscalculation as to the consequences of an intentional act, under circumstances perfectly well known to him, makes the result, actually inevitable and patently so to all the by-standers, an unexpected result and so an injury by accident.

The battle ground upon which the advocates of these different conceptions of unexpectedness have contended is that class of case which deals with the right of a person who, having some known or unknown physical weakness, is injured by doing the ordinary work which he is engaged to do, — work which would not have been injurious to any man in normal health. Under the decision of Clover, Clayton & Co. *v.* Hughes there is an injury by accident arising out of the employment when the exertion required in doing the work is too great for the man undertaking it, whatever the degree of exertion or condition of health.[16] It is immaterial whether the servant knows of his weakened physical condition, unless he is thereby led to expect injury to result to him as the result of a particular piece of work on which he is engaged. It is also immaterial

whose definition of the words "by accident" in Fenton *v.* Thorley is constantly cited as authoritative, says: "An occurrence I think is unexpected if it is not expected by the man who suffers by it, even though every man of common sense who knew the circumstances would think it certain to happen."

[15] So it was held in Nesbit *v.* Bayne & Burn, [1910] 2 K. B. 689, 3 B. W. C. C. 507, that the death of a cashier murdered while travelling by rail with a large sum of money to pay wages to his employer's miners, and in Anderson *v.* Balfour, [1910] 2 I. R. 497, 3 B. W. C. C. 588, a beating administered by poachers to a gamekeeper, were injuries by accident. But see *contra*, Murray *v.* Denholm & Co., 48 Scot. L. Rep. 896 (1911), where it was held that injuries inflicted upon non-union workmen by a mob of strikers who had invaded the employer's premises in order to drive out "blackleg" labor was not an injury by accident. The case of Challis *v.* London, etc. Ry., [1905] 2 K. B. 154, 7 W. C. C. 23, does not present this precise point, since the injury to the plaintiff, an engine-driver, was caused by stones thrown from a bridge by boys whose object was to throw them down the smokestack and not to hit the driver. The difficulty in the cases when an employee is intentionally injured by third persons having no connection with his employer's business is to determine whether it arises out of the business.

[16] Lord Loreburn in Clover, Clayton & Co. *v.* Hughes, [1910] A. C. 242, 3 B. W. C. C. 775. So compensation was allowed in Dotzauer *v.* Strand Palace Hotel, 3 B. W. C. C. 387 (C. A., 1910), where the plaintiff's physical condition was such that the ordinary conditions of the work, innocuous to ordinary persons, had injured him. The plaintiff, a dish washer with a peculiarly sensitive skin, was seriously affected by an ordinary washing mixture.

that a person, having medical skill or even the experience of an ordinary individual, would, if he knew what the workman knows, realize that injury must result from the work done; the injury is still unexpected if the workman miscalculates his powers and so overtaxes his strength and injures himself, so long as the sufferer does not intend to injure himself thereby or expect that injury will result to him on the particular occasion.[17]

3. The injury, to be regarded as "by accident," must be received, or, if a disease, contracted, at a particular time and in a particular place and by a particular accident.[18] And the accident must be something the date of which can be fixed.[19] It is not enough that the injury shall make its appearance suddenly at a particular time and upon a particular occasion.[20]

The injury must result from some particular incident in the business, some act done, or condition encountered, which has in the course of the sufferer's employment caused the particular harm, whether disease or physical impairment, of which the plaintiff complains. This incident, whether an act done by him or by some

[17] It is perhaps difficult, if not impossible, to reconcile the later case of O'Hara *v.* Hayes, 44 Ir. L. T. R. 71, 3 B. W. C. C. 586 (1910), with the decision in Clover, Clayton & Co. *v.* Hughes. In the latter case the plaintiff, who was suffering from aneurism of the aorta, was called upon to tighten up a nut with a spanner. The very slight exertion which was required caused the aneurism to break, resulting in his instant death; it was held that this was an injury by accident. In the case of O'Hara *v.* Hayes, a man affected with heart disease dropped dead while hurrying to the railway with a parcel weighing seventeen pounds. The county court judge held that in view of his disease there was evidence tending to show that the exertion involved in carrying this heavy parcel caused his collapse and death, but held that this was not an injury by accident. Two questions were submitted to the Court of Appeal: First, whether there was evidence to support this finding of fact; second, if such was the case, was the death an injury by accident? The Court of Appeai did not consider the first of these questions, but held that he was doing his normal work, there was nothing sudden, his death was not unexpected, he was liable to die any moment, and that the county court judge was right in holding that his death was not an injury by accident.

[18] Cozens-Hardy, M. R., in Eke *v.* Hart-Dyke, [1910] 2 K. B. 677, 3 B. W. C. C. 482, 487.

[19] Collins, M. R., in Steel *v.* Cammell, Laird & Co., [1905] 2 K. B. 232, 7 W. C. C. 9, 11: "In my opinion it is clear from s. 2 (2) of the Act, that an accident must be something the date of which can be fixed." The section in question provides that: "proceedings for recovery under this Act, for compensation for an injury, shall not be maintained unless notice of the accident has been given as soon as practicable after the happening."

[20] Steel *v.* Cammell, Laird & Co., *supra*. A workman who had worked for some time exposed to lead infection, became suddenly poisoned; this was not held to be an injury by accident.

other person or the encountering of some condition, must be shown to have occurred at some reasonably definite time. It is true that under Fenton *v.* Thorley and Clover, Clayton & Co. *v.* Hughes the incident, the act done or the condition encountered, need not be unusual except in this, that on the particular occasion its result is unexpected. The element of unexpectedness, inherent in the word "accident," is sufficiently supplied either if the incident itself is unusual, the act or conditions encountered abnormal, or if, though the act is usual and the conditions normal, it causes a harm unforeseen by him who suffers it. By this construction injury of gradual growth, as such not the result of some particular piece of work done or condition encountered on a definite occasion, but caused by the cumulative effect of many acts done or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm, is definitely excluded from compensation. And this is so whether the injury complained of is a disease contracted or an impairment of the physical structure of the body.[21] So stringent is the requirement that the injury should be due to some particular incident in the employment, that it has been held not enough that the complainant can point out a very few occurrences from some one or more of which the harm must have resulted.[22]

[21] It has been held that the following diseases are not injuries by accident: Lead poisoning due to the continuous exposure to infection, though taking the form of a sudden paralytic seizure, Steel *v.* Cammell, Laird & Co., *supra*; enteritis contracted by constantly inhaling sewer gas, in contact of which the complainant's employment habitually brought him, Broderick *v.* London County Council, [1908] 2 K. B. 807, 1 B. W. C. C. 2819; "beat hand," "beat knee," miner's diseases caused by continued friction, Marshall *v.* East Holywell Coal Company, Gorley *v.* Backworth Collieries, 21 T. L. R. 494, 7 W. C. C. 19 (C. A., 1905); with which compare Thompson *v.* Ashington Coal Co., 17 T. L. R. 345, 5 W. C. C. 71 (1901), in which it was held that the claim that is due to a particular piece of coal working itself into the knee of a miner who frequently had to work upon his knees was an injury by accident. The following impairments of the physical structure of the body have been held not to be injuries by accident: Paralysis caused by continuous overstrain due to the complainant being forced to ride a carrier tricycle in the course of his employment, Walker *v.* Hockney Bros., 2 B. W. C. C. 20 (C. A., 1909); and a gradual breakdown of the heart due to continued strain of overwork, Coe *v.* The Fife Coal Co., 46 Scot. L. Rep. 328, 2 B. W. C. C. 8 (Ct. Sess., 1909). How narrow is the line of demarcation is shown by comparison of this case with McInnes *v.* Dunsmuir & Jackson, 45 Scot. L. Rep. 804, 1 B. W. C. C. 226 (Ct. Sess., 1908), where it was held that cerebral hemorrhage was an injury by accident, where an artery in the brain, weakened by long-continued overwork, suddenly burst as the result of a particular act of over-exertion done in the course of the sufferer's employment.

[22] Eke *v.* Hart-Dyke, [1910] 2 K. B. 677, 3 B. W. C. C. 482. A gardener three sev-

Under these decisions two serious questions arise: *First*, whether the word "injury" should be retained without qualification; *second*, whether the words "by accident" should be omitted or retained, or whether some other word or phrase, such as "accidentally," should be used in lieu thereof.

1. In view of the English decisions holding that disease suddenly contracted in the course of employment is an injury by accident, it is evident that the word "injury" should not be used without qualification, unless it is desired that disease contracted should be a subject of compensation. The Act of 1897, under which the cases which have definitely attached this broad meaning to the word "injury" arose, made no provision for the relief of workmen incapacitated by illness or disease. Had the Act of 1897 contained the same provision for compensation for sufferers from occupational diseases which appears in the Act of 1906, it seems highly probable that compensation would be allowed only where injury is done to the integrity of the human body, as is the rule in Germany, where sickness, however caused, is cared for by a special fund raised by the joint contributions of the state, the employers, and the workmen, and administered by the latter.

The English courts, in their efforts to remedy the omission of Parliament to provide relief for workmen incapacitated by disease, have opened a wide door to claims of a highly litigious character. At first glance there appears little or no abstract justice in giving relief to one whose physical structure is violently deranged while at work, and denying it to one who is incapacitated by disease clearly proven to have been contracted in his employer's service. But there is a great practical difference between the two. Where there is a distinct change in the physical structure of the plaintiff, it is in the vast majority of cases possible and even easy to show some definite occurrence in the course of his service which has produced it, or at least the injury is generally one not likely to result from any other cause. The difficulty which will arise if compensation is allowed for disease lies in the fact that not only its existence but its

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eral days opened certain drains and cesspools; it was held that even if his death was due to blood poisoning resulting from the emanations from the cesspools, it was not an injury by accident, since it was impossible to point out a particular occasion upon which he was poisoned; Kennedy, L. J., dissenting.

origin can as a rule be proved only by the statement of the sufferer himself, corroborated by the testimony of his physician, which usually goes no further than a statement that the disease might be caused by some incident of the employment. Such claims are not only particularly easy to fabricate, but there is a great tendency in a sufferer to ascribe, without conscious dishonesty, his illness to some cause from which he may hope to obtain relief. But even if they are honestly put forward, the success or failure of such claims must depend upon a highly doubtful issue of fact. If such claims be allowed there will be a natural tendency on the part of every workman who suffers from disease to ask the opinion of the court whether it arose out of the business, and even where it is fairly clear that the illness did so arise, the interest of the employer will naturally induce him to contest the claim in the hope that the opinion of the court may be in his favor.

Disease should be dealt with, if at all, by providing, as in Germany, for the relief of all servants incapacitated by illness no matter what its origin, preferably out of some fund provided by the joint contributions of the employers and the workmen themselves; and this fund should, it seems, be administered, as in Germany, by the workmen themselves, who will have a better opportunity to detect malingering and to prevent it by their disapproval of it, induced by their liability for part of the loss caused by it. This relief should probably be restricted, as in Germany, to illness of a moderate duration. Total incapacity caused by illness is cared for in Germany by the invalidity insurance, which forms a part of the old age insurance. As there is no corresponding fund out of which permanent disablement can be relieved, it would seem that provision may well be made for compensation for what are technically known as occupational diseases. It is true that in this way total incapacity from non-occupational diseases, clearly contracted in the employer's service, will go uncompensated; but on the whole the added certainty in the administration of the law seems more than to compensate for this, even admitting it to be unjust to a few deserving sufferers. Under the German system for relieving sufferers from temporary illness, the workman being entitled to relief if incapacitated by disease, whether contracted in the employment or at home, the only issue which can be raised is the existence of the disease and the extent of the incapacity caused thereby; that most difficult

issue, the origin of the disease, is completely eliminated. And while this issue must arise in any act giving compensation for occupational diseases, such diseases being those to which workmen in particular employments are by reason of the character of the work peculiarly subject and being of a sort not likely to be otherwise contracted, their very nature makes it reasonably certain that they are contracted in the employment and not elsewhere.

2. As has been seen, the term "by accident" differs from the term "accidental" in that it requires that the injury shall be sustained on a single particular occasion the date of which can be fixed, and so excludes any injury, whether the disturbance of the physical structure of the body, or disease, which is of gradual growth. Unless it is desired to allow compensation for diseases or bodily impairments of gradual growth, it is evident that the term "by accident" should be retained, and that it should not be omitted or the word "accidental" substituted.

While there may seem no particular justice in allowing compensation for an injury which happens on a definite occasion, and excluding compensation for one of gradual growth though just as much the result of the work upon which the sufferer is employed, there are practical considerations which make it desirable to do so. One of the most valuable provisions in the English acts (and one which is being copied in most of the American legislation upon the subject) is that contained in sub-section 2 of section 2, which requires that notice of the accident be given to the employer "as soon as practicable after the happening thereof." The master is thus able personally to investigate the matter soon after its occurrence and verify the justice of the claim or detect any fraud or imposition; and so it conduces to the settlement of well-founded claims without further litigation and leads to the discovery of malingering and simulation. If the date of the accident be known, it is usually possible to find impartial witnesses who have observed and can remember the occurrence. This is certainly so if the injury is due, as it usually is, to some abnormal incident in the operation of the business, to some unusual act of the claimant himself or his fellow workmen, or to some unusual condition of or breakdown in the machinery or plant. Even if there is nothing more than a sudden and unexpected injury the result of some normal and usual operation or condition of the business, this in itself is generally sufficiently

striking to make it probable that the circumstances will be observed and remembered by others than the claimant himself. Thus the employer is able by independent testimony to verify the workman's claim, and either settle it at once or to demonstrate so clearly its fraudulent character that the workman will abandon it. And even if the claim is neither settled nor abandoned, but must be litigated, there is apt to be reasonably impartial testimony upon which the court can proceed in awarding compensation.

If, on the other hand, compensation is allowed for injury not happening upon any definite occasion, it is evident that notice of the injury must be all that can be required, with perhaps an added requirement that the causes which are alleged to have brought it about shall be set forth. If compensation be allowed for injuries or diseases of gradual growth, it is manifestly impossible for the servant to assign any specific occurrence or occurrences as the cause of his disablement; at most he can merely state that he was engaged upon a work of a sort capable of producing injury of the sort of which he complains and that he attributes his disability thereto. Such claims are incapable of any verification by impartial testimony, their validity is a mere matter of opinion or judgment; the workman's story can be corroborated, if at all, only by the testimony of medical experts, that the work upon which he was engaged is capable of producing the injury in question. If a definite occasion be set out during which the assigned cause of the injury is alleged to have operated, it is at least possible to prove that on that occasion there was no other cause existing equally capable of producing the injury. If it is enough to ascribe the injury to causes operating generally during a protracted period, as that of employment at a particular sort of work, it will usually be impossible to say whether during that period the workman may not have been exposed to other causes, external to the business, which might as probably have produced the injury, unless the injury is one which, like certain occupational diseases, is plainly the result of a cause peculiar to the business and therefore extremely unlikely to be encountered elsewhere.

A wide door will be opened to fraudulent claims, and it must not be forgotten that the right to compensation for injuries of this sort will act as a strong incentive to workmen to attribute every disease, every wearing out of their physical powers, to their labors in their

employers' business, and this will be so though the workmen are not consciously fraudulent. The possibility of compensation will inevitably direct their minds to the business as the cause of their sufferings, and often quite unconsciously they will come honestly to believe that all their misfortunes are due to their work therein.[23]

But there is a further serious objection to allowing compensation for injury or diseases of gradual growth. The effect of so doing would be to throw upon the last employer the duty of pensioning every workman worn out by a lifetime of labor or invalided by long exposure to the unhealthy conditions necessarily incident to many employments. Unless some elaborate system, such as is found in the occupational disease section of the English Act of 1906, be provided for the apportionment of the compensation among all the various employers in whose service the workman has been engaged, the last employer will be forced to pay for the whole of a loss which his business has caused in part only. Not only will this work an injustice to the last employer, but the effect upon workmen themselves would be extremely unfavorable; it will become difficult for any man to obtain employment after he has passed the very height of his prime, and the point of superannuation will be very materially reduced.

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[*To be continued.*]

[23] See as to this the very interesting paper on "Some Defects in the Workmen's Compensation Act," by R. J. Collie, M.D., J. P., Transactions of the Medico-Legal Society, vol. 6, p. 70, especially pp. 90–98.